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COMMENTS

SEAT BELTS AND CONTRIBUTORY NEGLIGENCE

"Buckle up," the public is told in many public service advertisements. Our nation is becoming increasingly aware of automobile safety, as evidenced by the passage of the National Traffic and Motor Vehicle Safety Act of 1966.¹ What effect will this awareness have in the courtroom? This Comment will examine the role of the seat belt as a safety device and focus on the question of whether or not the defendant will be permitted to use the plaintiff's failure to wear a seat belt as evidence of contributory negligence.² Two basic questions arise: (1) Is failure to use the seat belt substandard conduct? and, if so, (2) what should be the effect of such a determination?

Substandard Conduct

In general, contributory negligence³ is governed by the same standards that determine negligence of the defendant,⁴ except that contributory negligence involves exposure of the plaintiff to an unreasonable risk.⁵ The problems that normally attend judicial determination of a standard of conduct could be eliminated by legislation.⁶ It is well settled in Louisiana, for

1. 80 Stat. 718 (1966).

2. See Note, 12 S.D. L. REV. 130, 138 (1967), for a brief discussion on seat belts and assumption of risk.

3. Knight v. Thomas, 141 So.2d 134, 139 (La. App. 1st Cir. 1962): "Contributory negligence may be either an intentional and unreasonable exposure to danger created by defendant's negligence, of which danger plaintiff knows or has reason to know, or conduct which in other respects falls short of the standard to which a reasonable man should conform in order to protect himself from harm." See also RESTATEMENT (SECOND) OF TORTS § 466 (1965); W. PROSSER, THE LAW OF TORTS § 64 (3d ed. 1964). The first part of the definition is often confused with assumption of risk. "Unlike assumption of risk, the defense [contributory negligence] does not rest upon the idea that the defendant is relieved of any duty toward the plaintiff. Rather, although the defendant violated his duty, has been negligent, and would otherwise be liable, the plaintiff is denied recovery because his own conduct disentitles him to maintain the action." W. PROSSER, THE LAW OF TORTS § 64, at 427 (3d ed. 1964). See also 2 F. HARPER & F. JAMES, THE LAW OF TORTS § 22.2 (1956).

4. W. PROSSER, THE LAW OF TORTS § 64 (3d ed. 1964).

5. 2 F. HARPER & F. JAMES, THE LAW OF TORTS § 22.10 (1956).

6. To some extent present legislation in the field of workmen's compensation is analogous. (The analogy is not complete because the employer has not otherwise been negligent. LA. R.S. 23:1081 (1950) allows an employer the defense that the employee deliberately failed to use an adequate guard or protection provided for him.) See Herring v. Hercules Powder Co., 222 La. 162, 62 So. 2d 260 (1952), where the employer failed to sustain the burden of showing that connection of a brake would have avoided the accident,

example, that violation of a traffic law enacted in the interest of safety is negligence *per se*, and actionable if it has a causal relation with the accident.⁷ Thus one who failed to buckle his seat belt in violation of a statute requiring the use of seat belts would be negligent *per se* for the purpose of determining liability for resultant injuries. Presently, however, there is no such legislation in this country. Approximately thirty states, on the other hand, have laws requiring the *installation* of such devices.⁸ It is interesting to note that the legislatures of at least three states have clearly stated that, although seat belts must be installed, failure to use them will not constitute contributory negligence.⁹

In the absence of legislation requiring seat belt use the courts must determine the proper standard of conduct. Negligence can be determined by balancing the risk, in view of the social value threatened and the probability and extent of harm, against the value of the conduct to the actor, and the expedience of the action taken.¹⁰ This balancing between risk and harm is applied

and *Carter v. Christ*, 148 So. 714 (La. App. Orl. Cir. 1933), where the employee was denied recovery because he failed to use a safety rope. In general, see W. MALONE, *LOUISIANA WORKMEN'S COMPENSATION LAW AND PRACTICE* § 343 (1951) and latest supplement.

7. *Brown v. S. A. Bourg & Sons, Inc.*, 239 La. 473, 118 So.2d 891 (1960), commented on in *The Work of the Louisiana Supreme Court for the 1959-1960 Term—Torts*, 21 LA. L. REV. 322, 325 (1961); *Tooke v. Muslow Oil Co.*, 183 So. 97 (La. App. 2d Cir. 1938).

8. *Defense Memo*, 8 FOR THE DEFENSE No. 3 (1967). See Note, 14 DE PAUL L. REV. 152 (1964), for a list of the first twenty-three states and their respective source legislation. The article contains an in-depth discussion and analysis of seat belt legislation. The Federal Motor Vehicle Safety Standards, 32 C.F.R. § 2408 (1967), effective January 1, 1968, require installation of a combination lap belt and upper torso restraint (shoulder harness) in all out board seat positions that have the windshield header within the head impact area and either a lap belt-upper torso restraint combination or a lap belt in all other positions. *Id.* Standard No. 208, S3.1.1. See LA. R.S. 32:1401 (1950) for the enactment of the Vehicle Equipment Safety Compact which was enacted in 1964. Louisiana joins approximately thirty-eight other states with similar legislation providing for an interstate commission with authority to conduct research and recommend legislation requiring the installation of safety devices in vehicles. The organization is set up now and only time will tell whether or not it will be effectively operated.

9. Minnesota: MINN. STAT. ANN. § 169.685(2) (1964); Tennessee: TENN. CODE ANN. § 59-130(3) (1964); Virginia: VA. CODE ANN. § 46.1-309.1 (b) (1966).

10. Professor Prosser states: "It is fundamental that the standard of conduct which is the basis of the law of negligence is determined by balancing the risk, in light of the social value of the interest threatened, and the probability and extent of the harm, against the value of the interest which the actor is seeking to protect, and the expedience of the course pursued." W. PROSSER, *THE LAW OF TORTS* § 31, at 152 (3d ed. 1964). Even though this speaks of negligence, it can be applied to an analysis of contributory negligence. See note 4 *supra*. Although this Comment is concerned with contributory negligence, it should be mentioned, in passing, that one could be sub-

to determine whether the plaintiff has unreasonably exposed himself to danger so as to constitute contributory negligence. In considering the magnitude of the risk, inquiry should be made into the probability and gravity of the harm.¹¹

Mathematical certainty is not required in the balancing process. However, statistics are of some help in determining the probability that the risk will materialize. The present ratio of deaths and injuries per million passenger miles from traffic accidents is approximately one death for every 15 million passenger miles and one injury for every 365 thousand miles.¹² So expressed, the probability of death or injury does not seem great.¹³ In considering this factor, courts should also evaluate the effect which seat belts would have on this ratio.¹⁴ Courts will encounter difficulty because there are no statistics which can be said to be absolutely authoritative. Figures released by the National Safety Council, however, may be used as a guideline. These figures indicate that seat belt use would save between eight and ten thousand lives each year¹⁵ and reduce serious injuries by at least one-third.¹⁶ Certainly the legis-

jected to liability for negligence for not having worn his seat belt. Consider, for example, the situation in which the front seat passenger is secured by a seat belt and the passenger in the back seat is not. Upon impact the rear passenger will be thrown forward and will collide with the front seat passenger, who will remain stable. (No doubt this possibility leads to the requirement of installation of belts in the back seat.) In litigation between the two colliding parties, points raised in this article could be applied to determine any negligence of the back seat passenger in not using the device.

11. RESTATEMENT (SECOND) OF TORTS § 466, comment *c* of clause *a*, at 512 (1965); W. PROSSER, *THE LAW OF TORTS* § 31 (3d ed. 1964). See also H. Terry, *Negligence*, 29 HARV. L. REV. 40 (1915).

12. In 1966 passenger car mileage amounted to 730 billion miles. THE WORLD ALMANAC 799 (1966). In 1965 motor vehicle accidents accounted for 48,900 deaths and at least 1,800,000 injuries, of which 150,000 resulted in permanent impairment. *Id.* at 685. Figures for 1966 would be higher.

13. Couched in other terms, highway death statistics can be quite alarming. For example, between January 1961 and January 1965 approximately 2,000 military personnel were killed in Vietnam. During the same period of time, more than 6,900 servicemen were killed in automobile accidents on the public roads. *Hearings on H.R. 13228 Before the Committee on Interstate and Foreign Commerce*, 89th Cong., 2d Sess., ser. 89-37, pt. 1, at 615 (1966).

14. A detailed study of the value of the seat belt as a safety device is beyond the scope of this Comment. See Note, 1967 WIS. L. REV. 288, 292, for a factual study which was placed as an appendix to the decision of *Bentzler v. Braun*, 49 N.W.2d 626 (Wis. 1967). See Note, 12 S.D. L. REV. 130 (1967), for a discussion of the possible prejudicial effects of judicial notice of the seat belt as a safety device.

15. National Safety Council, *Belt Value Reappraised*, 26 FAMILY SAFETY No. 2 (June 1967).

16. Note, 1967 WIS. L. REV. 288, 292; Note, 14 DE PAUL L. REV. 152 (1967); *Bentzler v. Braun*, 149 N.W.2d 626, 630 (Wis. 1967).

lation, campaigns of various organizations,¹⁷ and widespread use by law enforcement agencies and racing drivers indicates that the belt is a safety device, but more study and statistical analysis is needed before the courts will be able to use figures in this balancing process with a high degree of precision.

The courts should also consider evidence of the possible detrimental nature of seat belt use. This is another area in which difficulties in determining which evidence is most reliable will be encountered. Numerous articles can be found which discuss case studies and other isolated instances of injuries caused by seat belts.¹⁸ The court, however, will be concerned with the overall picture, and this is where the problem arises.

The plaintiff's view is found to be:

"... The standard waist type seat belt can cause *more*, rather than fewer, injuries in many crash conditions. Other researchers have also concluded that the value of seat belts is limited."¹⁹

Of course, just what "many" means is unclear. It could be several hundred and yet constitute a small percentage of total accidents.

Defense counsel can find comfort in these words:

"Only in the most severe crash conditions are serious injuries likely to be associated with seat belt application. Even under these conditions, however, evidence derived

17. United States Public Health Service, National Safety Council, American Society of Safety Engineers, American Medical Association, Auto Industries Highway Safety Committee, Automobile Safety Foundation, American College of Surgeons, and the General Federation of Women's Clubs, to name a few. *Defense Memo*, 7 FOR THE DEFENSE No. 6 (1966).

18. Cocke & Meyer, *Splenic Rupture Due to Improper Placement of Automobile Safety Belt*, 183 J.A.M.A. 693 (1963); Fisher, *Injury Produced by Seat Belts, Report of Two Cases*, 7 J. OCCUPATIONAL MED. 211 (1965); Garrett & Braunstein, *Seat Belt Syndrome*, 2 J. TRAUMA 220 (1962); Howland, *Fulcrum Fracture of Lumbar Spine Induced by an Improperly Placed Seat Belt*, 193 J.A.M.A. 240 (1965); Kulowski & Rost, *Intra-Abdominal Injury From Safety Belt in Auto Accidents, Report of a Case*, 73 ARCH. SURG. 970 (1956); Rubovits, *Traumatic Rupture of the Pregnant Uterus from "Seat Belt" Injury*, 90 AM. J. OBSTETRICS & GYNECOLOGY 828 (1964); Tolins, *Unusual Injury Due to Seat Belt*, 4 J. TRAUMA 397 (1964); White, *The Role of Safety Belts in the Motorist's Safety*, 9 CLINICAL ORTHOPEDICS 317 (1957).

19. Kleist, *Seat Belt "Defense" Attacked*, TRIAL, August/September 1967, at 50.

from an earlier study indicates that automobile occupants are better off with a seat belt than without one."²⁰

Hopefully, future research and statistical analysis will furnish the courts with less conflicting data.

Gravity of Harm

Another factor in the balancing process is the gravity of the harm should the possibility of injury materialize.²¹ As grave injuries or deaths increase, the probability needed for finding negligence decreases.²² Common experience indicates that the gravity is exceedingly high, and statistics graphically demonstrate this point.²³ In weighing this factor, the courts should again consider evidence concerning the effect seat belt use would have on deaths and injuries.²⁴

The magnitude of the risk should then be weighed against the value which the law attaches to the supposed or real advantages enjoyed by the plaintiff in not wearing the safety belt.

Social Value of Non-use

Economically, purchase and installation of seat belts are inexpensive.²⁵ This factor alone, balanced against the size of the risk, conclusively favors seat belt use. A more important element, however, is the value society attaches to non-use. Public attitude is reflected in the extent of use. One report indicates that only thirty per cent of passenger cars have seat belts installed and they are only used fifty per cent of the time.²⁶ Another report covered 1,974 seat belt equipped autos involved in accidents. Belts were not in use at the time of the accident in sixty-three per cent of the cases.²⁷ This is another area in which

20. Garrett & Braunstein, *Seat Belt Syndrome*, 2 J. TRAUMA 220, 235 (1962). For a complete presentation of the entire area of seat belt negligence from a defense viewpoint see THE SEAT BELT DEFENSE (1967), a booklet, complete with case discussions and bibliography, published by Defense Research Institute, Inc. 1212 West Wisconsin Avenue, Milwaukee, Wisconsin 53233.

21. RESTATEMENT (SECOND) OF TORTS § 466, comment c on clause a, at 512 (1965); W. PROSSER, THE LAW OF TORTS § 31 (3d ed. 1964).

22. See generally H. Terry, *Negligence*, 29 HARV. L. REV. 40 (1915).

23. See note 12 *supra*.

24. See text at notes 14-18 *supra*.

25. *E.g.*, approximately seven dollars per set in the Baton Rouge, Louisiana, area.

26. *Defense Memo*, 7 FOR THE DEFENSE No. 6 (1966), citing a survey made by the American Trial Lawyers Association.

27. Note, 14 DE PAUL L. REV. 158 (1964), citing a joint study by the California Highway Patrol and the Automotive Crash Injury Research Center of Cornell University.

one is faced with a wide range of figures. Consider, for example, the results of a current survey.²⁸ It revealed that over fifty-two per cent of the cars surveyed (1,700,000) had seat belts installed, that approximately thirty-seven per cent of the drivers of cars surveyed always used the device, ten per cent never used them, and eighty-nine per cent used the belt some of the time. An earlier survey conducted by the same organization indicated that seventy-six per cent of those questioned used the belt on long trips.²⁹ A poll taken by the Columbia Broadcasting Company³⁰ for use on one of its National Driver's Tests revealed that about twenty-five per cent of the sample used the belt on short trips and forty per cent interviewed at a turnpike toll booth were using the device.³¹ Though the figures do indicate an increase in seat belt use, it appears that society as a whole attaches greater importance to whatever reason it finds to justify non-use.³²

In determining whether non-usage is sub-standard conduct, the courts should consider the extent of use by the public. However, such custom should not control if it can be shown that a reasonable man would wear the belt.³³ Evidence of custom is relevant only "as indicating a composite judgment as to the risks of the situation and the precaution required to meet them. . . . If the actor does what the others do under like circumstances, there is at least a possible inference that he is conforming to the community standard of reasonable conduct."³⁴

28. Conducted by the Auto Industries Highway Safety Committee and Reported in DEFENSE RESEARCH INSTITUTE, *THE SEAT BELT DEFENSE* 11 (1967).

29. *Defense Memo*, 7 FOR THE DEFENSE No. 2 (1966).

30. Aired over national television on December 5, 1967.

31. It is of interest to note that three out of four traffic deaths occur within twenty-five miles of home and more than half of all accidents causing injury or death are at speeds less than forty-five miles per hour. 12 CURRENT MEDICINE FOR ATTORNEYS 28 (1965).

32. No statistics were discovered which indicate why the safety belt is not used more often. Personal experience reveals that forgetfulness coupled with supposed loss of valuable time are the main reasons. It can be argued that one remembers well those details which he believes are important to survival and is willing to spend a little time attending to such matters. Other reasons include discomfort and fear of being trapped in a vehicle by a jammed buckle. Some of the reasons are merely rationalizations used to hide more basic feelings. For example, many say that they are afraid of being trapped in a car on fire or under water and may be unconscious or so severely injured that they could not release the belt. It is obvious, of course, that an unconscious person is not hindered in exiting by a seat belt and will not be aware of his fate. And it is unlikely that one who is so injured that he cannot release his belt buckle will otherwise be able to extricate himself.

33. RESTATEMENT (SECOND) OF TORTS § 295A (1965).

34. *Id.* comment b, at 61.

The extent of non-use should be considered when the court evaluates the effect of its decision beyond the interests of the immediate parties. It has been said that decisions requiring the use of seat belts will encourage public use,³⁵ thus achieving an apparently socially desirable end which outweighs any burden that may result from the decision. It is doubtful, however, that people who do not use seat belts to save their lives or avoid injury will begin to do so out of concern for the outcome of possible litigation.

Among the effects of requiring seat belt use will be a more protracted and expensive litigation process, since another area of dispute will be injected into the proceedings. At a time when dockets are already crowded and the basic scheme of automobile liability is being attacked,³⁶ this administrative burden will be seriously considered by the court. Another result will be an increase in the number of uncompensated, injured parties. Of course there is a corresponding benefit for the defendant, and the court will be torn between concern for the injured plaintiff and the desire to relieve the defendant from liability for injuries which might have otherwise been avoided by reasonable conduct on the part of the plaintiff.

Because of the far-reaching effects of such a decision, it is submitted that the courts should not find a duty to wear seat belts on the sole basis of what may be desirable from the standpoint of public safety. Wider acceptance by the public, as evidenced by greater use, will be a stronger indication that it is unreasonable not to wear the device.

Jurisprudence

Of the nine cases discovered in point,³⁷ four would not permit the defendant to plead contributory negligence based on the

35. 12 CURRENT MEDICINE FOR ATTORNEYS 28 (1965), quoting a Sydney Harris column.

36. *E.g.*, see J. O'Connell, *Basic Protection-Relief for the Ills of Automobile Insurance Cases*, 27 LA. L. REV. 647 (1967).

37. An interesting case not concerned with the issue of contributory negligence is *Mortensen v. Southern Pac. Co.*, 53 Cal. Rptr. 851 (1964). This was an FELA case involving an accident in which the plaintiff's decedent was in a company truck hit from the rear and forced off the highway down an embankment. The defendant's failure to provide seat belts for its employees was held to be negligence. The court reasoned that the evidence was sufficient to base a finding that the particular type of accident was foreseeable. The court said: "We deal with the general likelihood of automobile collisions upon the highway, not with the peculiar causation of the particular collision which gives relevance to the need for seat belt protec-

failure of the plaintiff to wear seat belts. Three of the remaining cases are from Wisconsin. The Wisconsin Supreme Court found "a duty, based on the common law standard of ordinary care to use available seat belts."³⁸ The other two cases at least permitted the defendant to raise the issue.

*Brown v. Kendrick*³⁹ involved a suit by a minor guest passenger for personal injuries. The Florida appellate court upheld the striking of the defense of contributory negligence based on the plaintiff's failure to fasten her seat belt. The absence of legislation was noted, and the court said that it would not "legislate on the subject."⁴⁰ The issue was confused by the statement that the defendant had not shown, "except by conjecture, that the use of seat belts would have prevented the injury."⁴¹

The Delaware court in *Libscomb v. Diamiani*⁴² adopted the rule expressed in *Brown*. It said that, under the circumstances, "it is extremely difficult to analyze the variables presented in failing to buckle a seat belt upon entering an automobile for normal, everyday driving. To ask the jury to do so is to invite verdicts on prejudice and sympathy contrary to the law. . . . Seat belts are new devices and are only a continuing step in the development of automobile safety."⁴³ The many variables involved in attempting to rule on such an issue caused the court to admit in its conclusion that "the problem is not without analytical difficulty."⁴⁴ Hence, the Delaware court, like the Flori-

tion." *Id.* at 854. Some emphasis was placed upon the fact that the defendant's safety experts had recommended installation of safety belts for six years.

38. *Bentzler v. Braun*, 34 Wis. 2d 362, 149 N.W.2d 626, 639 (1967).

39. 192 So.2d 49 (Fla. App. 1966), noted in 10 A.T.L.A. NEWSLETTER 16 (Feb. 1967).

40. *Id.* at 51.

41. *Id.* How could he have shown otherwise if he was not even permitted to plead the issue, much less introduce evidence. *Sams v. Sams*, 247 S.C. 467, 148 S.E.2d 154 (1966) (see text at note 59 *infra*), was acknowledged, but the Florida court said that "[we] do not feel that this court is ready nor in a position to adopt a similar construction as the law of Florida." *Id.*

42. 226 A.2d 914 (Del. Super. 1967), noted in 10 A.T.L.A. NEWSLETTER 83 (April 1967).

43. *Id.* at 917.

44. *Id.* at 918. These problems included drafting instructions to the jury, precedent in the area of safety devices, and the fact that not all registered vehicles are equipped with the device. In the words of the court, "Why should the whole burden of the reasonable standard of care fall on the person who has seat belts, but fails to use them?" *Id.* Also troubling the court was the difficulty of proof of causation and the possible limiting of traditional tort doctrines such as last clear chance and that failure to anticipate another's negligence is not negligence such as to defeat recovery for injury sustained. "In short, the full impact of the seat belt question has not been fully explored to the satisfaction of this court." *Id.*

da court in *Brown*, believed the issue to be one for the legislature. It noted that not all cars are equipped with seat belts, that expert testimony is mere conjecture, that the failure to anticipate another's negligence is not negligence such as to defeat recovery, and the doctrine that the defendant takes the plaintiff as he finds him.

*Simpson v. Penman*⁴⁵ held that the absence of seat belts in decedent's truck was not a valid basis for finding contributory negligence. The court said,

"[To] use the general conclusion — that the use of seat belts would reduce vehicle fatalities — to find that in the instant case the use of seat belts . . . would have prevented decedent's death, again invites speculation and conjecture beyond any reasonable point."⁴⁶

Testimony by the defendant's expert that the use of seat belts reduces fatalities was held inconclusive. He also admitted that under certain circumstances the use of seat belts may cause injuries.⁴⁷

The court in *Kavanagh v. Butorac*⁴⁸ said that the defendant did not show that studies on the safety value of the seat belt had "wide circulation which of itself might constitute some proof that the use of seat belts was so normal, natural, safety oriented and generally accepted that the reasonably prudent man would never fail (under the circumstances involved here) to 'buckle up'. Without such showing it is our opinion that the trial court committed no error in excluding the exhibits mentioned."⁴⁹

Looking to the future, the court said, "the many daily observations concerning use of seat belts do not necessarily reflect the situation pertaining at the time of this accident but seem to indicate future recognition by the common law."⁵⁰ The court stressed that its decision that failure to fasten a seat belt was not contributory negligence was "limited to the facts of this case."⁵¹

45. Unreported case, N.D. Ind. (1967), noted in 10 A.T.L.A. NEWSLETTER 47 (March 1967).

46. *Id.*

47. See text at note 18 *supra*.

48. 221 N.E.2d 824 (Ind. App. 1966), noted 31 ALBANY L. REV. 373 (1967).

49. *Id.* at 832. The exhibits rejected were reports by the American Medical Association, National Safety Council, and Automotive Crash Injury Research Center of Cornell University.

50. *Id.* at 831.

51. *Id.* at 833.

Of the cases permitting a finding of contributory negligence, *Vernon v. Droeste*⁵² is of greatest interest to Louisiana practitioners because, at the time of trial, Texas had no statute requiring the installation of seat belts.⁵³ The plaintiff was in an auto equipped with seat belts but was not wearing one at the time of the accident. The jury answered, "We do," in answer to the following special interrogatory:

"Do you find from preponderance of the evidence that the plaintiff, Albert E. Vernon's, failure to wear the safety harness with which the Volvo automobile was equipped was failure to exercise that degree of care that would have been exercised by an ordinary prudent person under the same or similar circumstances?"⁵⁴

The Wisconsin Supreme Court in *Bentzler v. Braun*,⁵⁵ a suit by an injured front seat passenger, held,

"We agree . . . that it is not negligence *per se* to fail to use seat belts where the only statutory standard is one that requires . . . installation . . . we nevertheless conclude that there is a duty, based on the common law standard of ordinary care, to use available seat belts independent of any statutory mandate."⁵⁶

Recognizing that the above statement is the law of Wisconsin, the next two cases can be considered as merely illustrative. In *Busick v. Bunder*⁵⁷ and *Stockinger v. Dunisch*⁵⁸ the courts informed the respective juries of the Wisconsin statute requiring the installation of seat belts. The *Busick* court said that, although the law does not require the use of seat belts, the jury could find that the plaintiff was negligent in failing to wear hers, and that it could consider the fact that the car was equipped with seat belts. The *Stockinger* court went further and found a duty, based on the statute, for the driver and front

52. District Court, Brazos County, Texas (85th Jud. Dist. 1966), cited in *Defense Memo*, 8 FOR THE DEFENSE No. 3 (1967).

53. Also, Texas courts do not recognize the doctrine of comparative negligence, but apply the rule that causal contributory negligence bars recovery. See text at note 73 *infra*.

54. *Defense Memo*, 8 FOR THE DEFENSE No. 3 (1967).

55. 34 Wis.2d 362, 149 N.W.2d 626 (1967).

56. 149 N.W.2d at 639.

57. Circuit Court for Milwaukee County, Wisconsin, Civil Div., Branch 5, Case No. 381-602, cited in *Defense Memo*, 7 FOR THE DEFENSE No. 6 (1966).

58. Circuit Court for Sheboygan County, Wisconsin (October 1964), cited in *Defense Memo*, 7 FOR THE DEFENSE No. 6 (1966), and Note, 1967 Wis. L. REV. 288.

seat passenger to wear available belts. Depending on one's viewpoint, this court was either legislating as the Florida court⁵⁹ refused to do, or carrying the statute to its logical conclusion.

In *Sams v. Sams*⁶⁰ the South Carolina Supreme Court held that the trial court should not have stricken the seat belt defense. It said, "We hold . . . that such questions should be decided, and can be decided much more soundly, in light of the facts and circumstances adduced upon trial."⁶¹

It would be difficult to state which court, if any, has the best view. It is submitted that the Wisconsin determination of a duty to wear the seat belt when available⁶² will ultimately become the majority approach as litigation increases and the value of the seat belt is realized by the public. While this view is somewhat premature, it is by no means insupportable. The decisions are of value particularly as a source of the objections which must be overcome⁶³ before it can be said that the failure to wear seat belts is substandard conduct.

Effect of Finding

When it is determined that non-use of the seat belt is substandard conduct and the plaintiff was therefore contributorily negligent, he should be denied recovery only for those injuries which he would not have sustained but for his failure to wear the belt.⁶⁴ A distinction must be made between the cause of the accident and the cause of the injury. Without this process the case will become greatly confused.

An examination of Louisiana traffic accident cases indicates how the courts have handled somewhat comparable situations.⁶⁵

59. *Brown v. Kendrick*, 192 So.2d 49 (Fla. App. 1966). See text at note 40 *supra*.

60. 247 S.C. 467, 48 S.E.2d 154 (1966).

61. *Id.* at 471, 148 S.E.2d at 156.

62. See text at note 38 *supra*.

63. For example, see text following note 44 *supra*. For an exercise in legal gymnastics consider seat belt contributory negligence in relation to last clear chance. See Comment, 27 LA. L. REV. 269 (1967), for a discussion of last clear chance in Louisiana.

64. RESTATEMENT (SECOND) OF TORTS § 467 (1965); W. PROSSER, THE LAW OF TORTS § 64 (3d ed. 1964). See generally W. Malone, *Ruminations on Cause-in-Fact*, 9 STANFORD L. REV. 60 (1956).

65. It will be noted that the language of the court is occasionally couched in terms of assumption of risk when technically contributory negligence is the issue. The thin line of distinction between the two is seldom preserved. See note 3 *supra*.

Cases often arise in which the plaintiff was riding on the fender, running board, bumper, or otherwise in a precarious position on a vehicle.⁶⁶

In *Koewen v. Amite Sand & Gravel Co.*⁶⁷ plaintiff was riding on the fender of the vehicle. The court held that he had assumed the risk incidental to the operation of the auto by the driver, but did not assume the risk of dangers created by reckless driving of the truck which hit him.

The plaintiff in *Stout v. Lewis*⁶⁸ had been riding on the running board of an auto. On the general issue of plaintiff's negligence the court held that he assumed the risk of his precarious position, and "if it be said that his injuries were the natural consequences of the risk he assumed, he cannot recover."⁶⁹ It continued, "It is not sufficient to say that he would not have been hurt, if he had not been on the running board, because he might have reached his destination without injury, but for the negligent management of the car, on the running board of which he was riding; a risk he did not assume."⁷⁰

*Jones v. Indemnity Ins. Co. of North America*⁷¹ involved a girl who had been riding in the rear of a pickup truck. While rounding a corner she was thrown out. She had been instructed to sit on the floor, and, before the accident in question, had stood up and fallen from that position. This court also spoke of natural consequences and found that she had not assumed the risk of dangers brought about by the negligent acts of the driver.⁷²

Thus, in seat belt cases it must be shown that the plaintiff's injury was of the type which would naturally follow from non-use of seat belts. A plaintiff not wearing a seat belt should not be denied recovery, for example, for injuries sustained as the

66. In addition to those discussed herein, see *Vaughn v. Cortez*, 180 So.2d 796 (La. App. 3d Cir. 1965) (riding on fender); *Smith v. Whittington*, 159 So.2d 327 (La. App. 2d Cir. 1964) (rear of hay truck); *Jack v. Sylvester*, 150 So.2d 789 (La. App. 3d Cir. 1963) (riding in rear of truck without bed); *Elliot v. Coreil*, 158 So. 698 (La. App. 1st Cir. 1941) (plaintiff was riding on an improvised seat in the rear of an automobile).

67. 4 So.2d 79 (La. App. 1st Cir. 1941).

68. 123 So. 346 (La. App. Orl. Cir. 1929).

69. *Id.* at 348.

70. *Id.*

71. 104 So.2d 197 (La. App. 2d Cir. 1958).

72. Of this type of analysis Professor Prosser writes: "What is meant is that the plaintiff's conduct has not exposed him to any foreseeable risk of the particular injury through the defendant's negligence, and is therefore not available as a defense." W. PROSSER, *THE LAW OF TORTS* § 64, at 432 (3d ed. 1964).

result of something falling upon the vehicle. Expert testimony will be needed to demonstrate that the injury would have been avoided by the use of a seat belt.⁷³

If it be said that an award based upon the above criteria does not follow the rule that a plaintiff who has been negligent will be denied recovery entirely when his negligence was the cause of the injury,⁷⁴ Civil Code article 2323⁷⁵ could be applied. "It should make no difference whether the 'thing' exposed to the defendant's negligence is the plaintiff's interest in his property or his person."⁷⁶ Perhaps Louisiana courts will be less reluctant to ignore this provision because application will be attempted in a new area of tort law. If it be applied, plaintiff will be allowed to collect only those damages directly chargeable to the defendant. Therefore, in the case of a plaintiff-owner who attempts to recover for damages to his automobile as well as his personal injuries, the court must be particularly careful to

73. See 16 AM. JUR. *Proof of Facts—Seat Belt Accidents* § 52 (1965). Apparently this type of analysis is available, for statistics are often given in terms of a certain number of accidents in which the injured may or may not have been helped by the seat belt. For example, a study of the San Diego, California, Police Department yielded the following results: during the month of August 1962, 282 motorists were injured and five killed. Seat belts would have saved five lives, prevented 49% (139) injuries, lessened 21% (60), and lessened or prevented 9% (26), in 6% (14) unknown effect, and no effect in 15% (43). *Defense Memo*, 7 FOR THE DEFENSE No. 2 (1966). In *Mortensen v. Southern Pacific Co.*, 53 Cal. Rptr. 851 (1964), note 37 *supra*, a physicist and a highway patrolman were called as expert witnesses. In *Vernon v. Droeste*, cited in *Defense Memo*, 8 FOR THE DEFENSE No. 3 (1967), an expert testified that had the plaintiff been wearing the seat belt-shoulder harness he would have been held away from the windshield and would not have sustained his injuries. He stated that seat belts materially lessened injuries in 95% of the cases where they were used and that the seat harness would be of assistance in even more instances. Apparently his testimony was given great weight. See note 74 *infra*.

74. Texas does not recognize the doctrine of comparative negligence and follows the same rule as to the effect of causal contributory negligence that Louisiana does, *i.e.*, a complete bar to recovery. Yet, in the case of *Vernon v. Droeste*, cited in *Defense Memo*, 8 FOR THE DEFENSE No. 3 (1967), the special interrogatories and the jury's answers were as follows: "Q. Do you find from a preponderance of the evidence that such failure [to wear the safety harness], if any, was a proximate cause of the Plaintiff, Albert E. Vernon's, injuries? A. We do. Q. If you have answered the foregoing special issue, 'We do,' and only in that event then answer the following special issue. What per cent of the Plaintiff, Albert V. Vernon's, injuries would have been avoided if he had been wearing the safety harness with which the Volvo automobile was equipped at the time of the collision in question? A. 95%." The judgment reflected a 95% reduction.

75. See W. Malone, *Comparative Negligence, Louisiana's Forgotten Heritage*, 6 LA. L. REV. 125 (1945). LA. CIVIL CODE art. 2323: "The damage caused is not always estimated at the exact value of the thing destroyed or injured; it may be reduced according to circumstances, if the owner of the thing has exposed it imprudently."

76. *Id.* at 132.

distinguish between the cause of the accident and the cause of the injury. Admittedly, this type of problem is rarely encountered,⁷⁷ but precision in analysis would be required.

Conclusion

The possibilities of seat belt negligence are limited only by one's imagination and future developments in the field of automobile safety. It is not difficult to imagine, for example, a time when one who rides in an auto not equipped with seat belts will be as contributorily negligent as one who rides with a drunken driver.

Though many more questions have been raised than answered, it is hoped that the reader has been introduced to an imposing area of future litigation. If care is taken not to impose standards of conduct on the sole criteria of what is desirable from a safety standpoint, and a clear distinction is maintained between the cause of the accident and the cause of the injury, the task of working with seat belts and other safety devices in the legal arena will be much easier.

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77. Though speaking of negligence and not *contributory* negligence, language of Professor James is interesting. "It must be conceded that it is in theory possible for the defendant's conduct to be negligent only toward property, or toward persons, and not the other. But in automobile cases such possibility is to the last degree remote. I have never known of such a case. Moreover, *it would present no insurmountable problem to the court or jury if it should arise.*" F. JAMES, CIVIL PROCEDURE § 11.11, at 559 (1965). (Emphasis added.) Due to the limited scope of this Note, a more detailed discussion of the procedural and administrative aspects of the problem is not included. In passing, the danger of splitting one's cause of action is mentioned. In Louisiana, one sustaining both property damage and personal injury from a single tort does not thereby acquire two separate and distinct causes of action. *McConnell v. Travelers Indem. Co.*, 222 F. Supp. 979 (E.D. La. 1963); *Fortenberry v. Clay*, 68 So.2d 133 (La. App. 1st Cir. 1953); *Bolinger v. Williams Bros.*, 134 So. 356 (La. App. 2d Cir. 1931). In the *Fortenberry* case, the plaintiff filed two separate suits in the same court, one for damages to his automobile, the other for personal injuries. The property suit was tried first and plaintiff was awarded judgment. Defendant paid and plaintiff executed a release in which he reserved all rights in the other suit. The release being *ex parte*, defendant filed an exception of no right and no cause of action in the personal injury case. In sustaining defendant's position and dismissing the suit, the court held: "In order to have protected his claim for personal injuries after he had failed to demand damages therefor in his first suit, he should have either amended his petition or dismissed his suit as of non-suit and filed another suit including both claims." 68 So.2d at 135.

See Annot., 62 A.L.R.2d 965 (1958), for a discussion of 40 American jurisdictions. Thirty-one states follow the rule adopted by the Louisiana courts.